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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 568

PINEY COKING COAL LAND COMPANY,
A CORPORATION,
Petitioner,

versus

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, Piney Coking Coal Land Company, seeks a writ of *certiorari* to the Supreme Court of Appeals of West Virginia to review its judgment rendered June 22, 1940 (R. 198-209), rehearing denied September 16, 1940 (R. 237), reversing a decree of the Circuit Court of Raleigh County,

West Virginia, pronounced in this cause August 23, 1939, and deciding that the lien of the State, under Chapters 106 and 108, Acts Legislature 1937, (2) (Apx., pp. 23-24) for gross sales and consumer's sales taxes, penalties and interest which accrued during the years 1937-38 (R. 1-6), was (a) superior in priority to all rights of petitioner under coal mining leases entered into in 1925 and 1930, respectively (R. 21-63), including the right of reentry by petitioner for default made by the lessee, prior to appointment of receivers to take charge of its property, in the payment of rents, royalties and taxes, under the provisions of Section 15, Article 4, Chapter 36, Code West Virginia, (3) (Apx., p. 24), which expressly conferred on petitioner the right to reenter the demised premises for such default, and (b) was also superior and prior to the lien held by petitioner for unpaid rents, royalties and taxes under the terms of its purchase of the property of the lessee at the sale thereof made June 1, 1939, under decree of May 18, 1939, and the confirmation of that sale and purchase by the court without objection by the Tax Commissioner by a final decree pronounced in the cause August 23, 1939 (R. 172, 128, 167, 169-71), and from which decree the Tax Commissioner did not appeal. His petition for appeal expressly states that the decree from which appeal was sought was the decree of August 23, 1939, "which decree ratified and confirmed the decree of May 18, 1939, overruling certain exceptions filed by your petitioner to the report of the Commissioner in Chancery, under date of May 4, 1939" * * * (R. 1-2, 123 R. 1-2, 4). No attempt was made by the Tax Commissioner to appeal from any other decree pronounced in this cause. This application is made prior to December 14, 1940, U. S. C. A. Title 28, Section 350.

II.

The jurisdiction of this court is asserted under Judicial Code, sub-division "(b)" of section 237, amended U. S.

C. A. Title 28, sub-division "(b)" of section 344, and Rule 38 of this Court.

III.

1. The provision of the Federal Constitution invoked by the petitioner is section 10 of Article I, inhibiting a State from passing a law impairing the obligation of contracts.

2. The provision of the Amendment to the Federal Constitution invoked by the petitioner is the due process clause of section 1 of the XIV Amendment.

IV.

Summary and Brief Statement.

The facts are that by indenture of lease dated June 16, 1925, petitioner let and leased to Leccony Smokeless Coal Company 2065.45 acres of land in Raleigh County for coal mining purposes (R. 21-31—Stipulation omitting parts of record in Supreme Court, R. 182-86), for the term of twenty years, with the right of renewal, and provided for the payment of a minimum annual rental of $10.00 per acre, plus taxes as a part of the rent on the demised premises, with the right to the lessee to mine sufficient coal at the stated royalty rate per ton to reimburse itself for the minimum rental and taxes paid (R. 24-26). By express terms of the lease petitioner was given the right to re-enter the demised premises for (a) the non-payment of rents, royalties and taxes; (b) the breach of any covenant contained in the lease; (c) if the lessee be adjudged to be insolvent, or (d) in case the property of the lessee, or any part thereof, was placed by order of court in the hands of a receiver (R. 26-27, 30-31). The lease also contained a covenant against assignment, subletting and underletting of the demised premises, in whole or in part, without the license and consent in writing under seal of petitioner being first obtained, and provided

that any transfer or assignment by operation or process of law should be deemed an assignment within the meaning of that provision and a violation of such covenant (R. 28-29). It further provided that in case of forfeiture of the lease for any cause, all improvements, buildings, mining machinery and equipment used by the company in carrying on mining operations, and which might be necessary or convenient for the continued operation of the mines, should be left on the premises in good condition, so that mining might be continued by petitioner, or its tenants without delay or interruption and should revert to and become the property of petitioner (R. 30).

By Supplemental Indenture of Lease dated July 1, 1930, petitioner also leased to the same coal company 974.81 acres of other lands in Raleigh County for coal mining purposes, to be taken and held by the lessee under and subject to the payment of the rentals and royalties and to all the terms of the several leases therein referred to, among which is the lease of June 16, 1925 (R. 56-60 erroneously referred to as being dated June 8, 1925, Lease Book No. 3, page 446. R. 33, 39, 106, 175).

On December 15, 1938, Leccony Smokeless Coal Company, being then insolvent, Harry E. Moran, a stockholder owning more than one-fifth of its outstanding capital stock, filed his bill of complaint and exhibits in the Circuit Court of Raleigh County, West Virginia, to convene creditors, have receivers appointed to take charge of the assets of the company and to wind up its affairs under sections 81 and 82 of article 1, chapter 31, Code of West Virginia, 1931 (R 9) (4) (Apx. 24-25). The bill charged that the company was hopelessly insolvent and prayed that the business and affairs of the company be wound up, the corporation dissol ed and the appointment of receivers to take charge of and preserve the property of the company and administer the same as the court might from time to time decree; that

the receivers to be appointed be authorized to continue the operation of the mine and for that purpose to take possession and control of its mining leases and leaseholds, mining machinery, equipment and all other property and for the issuance of such injunctions as justice and equity might require; that the cause be referred to a commissioner to ascertain and report the property owned by the company, its debts, the liens and priorities of creditors and for general relief. Among the debts of the company set up in the bill were rents and royalties owing and due petitioner in the approximate sum of $18,000.00, and taxes owning to the State of West Virginia and the United States of America approximating $30,000.00 (R. 9, 12, 16, 19-21).

Leecony Smokeless Coal Company filed its answer to the plaintiff's bill which substantially admitted its allegations and joined in the prayer for the appointment of receivers, and that the court take possession and control of and administer its property (R. 69-71). The Circuit Court entered a decree December 15, 1938, appointing two special receivers of the property of the company and among other things decreed that, *subject and subordinate to the provisions of the decree with respect to the property rights, interest and lien or liens of petitioner,* the receivers were authorized to continue the business of the company of mining and shipping coal from the property of petitioner until the further order of the court; authorized the receivers to borrow money by the issuance and sale of receiver's certificates not to exceed $50,000, which certificates were to be repaid "after the payment of all rents and royalties accrued during the receivership to Piney Coking Coal Land Company, its successors or assigns, from the sale of coal mined and shipped at the said mining plants" of the coal company. The receivers were further authorized by this decree to employ laborers and other employees in carrying on such business, "but sub-

ject and subordinate in all respects to all liens heretofore accrued and to hereafter accrue to the said Piney Coking Coal Land Company, and to all rights and remedies of the said Piney Coking Coal Land Company, as Lessor of the said Leccony Smokeless Coal Company, for rents and royalties heretofore accrued or hereafter accruing under any and all of the leases, supplemental leases and agreements held by the said Leccony Smokeless Coal Company, as Lessee of the said Piney Coking Coal Land Company, Lessor, on lands and interest in lands situated in Raleigh County, West Virginia, and described in such leases, supplemental leases and agreements". This decree also enjoined all persons, firms and corporations from instituting or further prosecuting actions at law or suits in equity against the coal company, or *in any manner interferring with the possession by the special receivers* of the property and assets of the coal company (R. 72-76).

On February 8, 1939, petitioner filed its separate answer to plaintiff's bill and set up therein rents, royalties and taxes owing to it by the coal company which had accrued for payment during the period January 1, to December 15, 1938, in the sum of $21,649.53. Petitioner also set up in its answer and claimed the benefit and protection of all of the above recited provisions of its lease and supplemental lease to the coal company, and denied the right of the Circuit Court to authorize the special receivers to continue the business of mining and shipping coal from its properties for any length of time to the prejudice of its rights as lessor of the coal company, or to the prejudice of any of its rights and remedies under its leases and especially its remedies for the collection of rents, royalties and taxes owing and due, or to become due to petitioner from the coal company under the terms of its lease and supplemental lease, and charged that any operation of the mine of the coal company must be carried on subject and

subordinate in all respects to all liens theretofore accrued or thereafter to accrue to petitioner, and to all its rights and remedies as lessor of the coal company. The answer also denied the right to sell, transfer or set over the lease and supplemental lease for any time or term without the license and consent in writing under seal of petitioner as provided in the lease, and averred that if any sale or transfer thereof was made without such license and consent of petitioner it would exercise the right which it had under the terms of its lease to declare a forfeiture thereof, and as well also of the supplemental lease, and that petitioner would accordingly declare a forfeiture thereof and forfeit the same (R. 87-88). The answer prayed, among other things, for a decretal judgment in favor of petitioner for unpaid rents, royalties and taxes; that petitioner be decreed to have the first lien against all the personal property owned by the coal company located on the leased premises, or not removed therefrom more than thirty days, for the payment of all accrued rents, royalties and taxes and for general relief (5) (Apx. p. 25) (R. 89-90).

The Commissioner to whom the cause was referred by decree of March 7, 1939 (R. 94-96), found and reported (a) that the company owned the lease of June 16, 1925, and supplemental lease of July 1, 1930 (R. 106-07), and (b) an inventory of the plant and equipment of the company; (c) that the first lien against the personal property of the coal company was for personal property taxes owing by the company to the State of West Virginia for the years 1937 and 1938 in the amounts of $694.12 and $652.60, and the personal property taxes for the current year 1939 not then ascertained; (d) that the coal company was owing and indebted to petitioner for rents and royalties under the lease and supplemental lease for the period January 1, 1938, to December 15, 1938, in the sum of $20,116.35, plus interest thereon, and taxes payable as rent on the leased

premises for the year 1938, in the sum of $3088.08; (e) that the special receivers were owing and indebted to petitioner for rents and royalties which had accrued under receivership from December 15, 1938, the sum of $4998.31 and that the total amount owing by the coal company to petitioner for rents, royalties and taxes aggregated $28,202.74, and (f) that petitioner had the *second lien* on all of the personal property owned by the coal company which was a lien second only to the above recited lien for specific personal property taxes (R. 102-4). The commissioner reported that the *sixth lien* against the property of the coal company was the lien of the United States government for taxes, (later compromised and settled R. 168-169), and the *seventh lien* was the lien of the State of West Virginia for gross sales and consumers sales taxes, penalties and interest (R. 111-112).

Among the improvements on the demised premises were 114 dwellings and 26 garages (R. 102, 129, 134). The chief value of the assets of the company consisted of the lease and supplemental lease and the improvements on the demised premises.

On May 23, 1939, the State Tax Commissioner filed exceptions to the commissioner's report stating as the ground of exception thereto that he had failed to list the liens of the State of West Virginia for gross sales and consumer's sales taxes, penalties and interest as being prior to all other liens and claims except those due the United States (R. 122-125). The Circuit Court held that the lien of petitioner for unpaid rents, royalties and taxes was prior to the lien of the State of West Virginia for gross sales and consumer's sales taxes, penalties and interest, and on May 31, 1939, a decree was pronounced *nunc pro tunc* as of May 18, 1939, overruling the exceptions of the Tax Commissioner to the report of the commissioner, in all respects confirming the report of the commissioner and directed

that sale of the property of the company be made for cash. This decree further provided that the above recited lease and supplemental lease should not be assigned or transferred to any purchaser unless the purchaser should join in the assignment and thereby agree and expressly assume all of the duties and responsibilities of the purchaser to petitioner under the terms of the lease and supplemental lease, and further on condition that petitioner should consent in writing to such assignment and transfer. The decree also provided that *should any lien creditor become the purchaser of the property of the coal company at the sale such creditor,* after paying sufficient cash to defray the costs of suit and sale and reasonable costs of maintaining the property during receivership, and to pay off and discharge prior liens, if any, to the lien held by the purchaser "according to the priority of liens as fixed and adjudicated by this decree, be entitled to have the amount of the lien so held by such purchaser applied to the payment of such purchase price" (R. 128, 163-166).

June 3, 1939, the assistant United States attorney moved the court to recommit to the commissioner the report theretofore made by him, and to set aside the decree confirming the report, in which motion certain other parties joined, but the State Tax Commissioner *did not join in this motion,* and an order was entered on that day docketing the motion of which the court took time to consider—reserving the right to thereafter modify, amend, vacate or in any way alter the decree of May 31, 1939, at any regular or special term of court thereafter held. At a subsequent term of the Circuit Court held August 23, 1939, the assistant United States attorney moved the court for leave to withdraw the motion theretofore made June 3, to set aside the decree confirming the commissioner's report, in which motion all of the parties joined who had joined with the assistant United States attorney in the motion made June

3, 1939, and they also moved the court to rescind the right reserved by the decree entered June 3, 1939, to thereafter modify, amend, vacate or alter the decree of May 18, 1939, and there being no objection made to the motion it was sustained by the court and the decree of May 18, was by this decree of August 23 in all respects ratified and confirmed. This is the decree, *and the only decree,* entered in this cause from which the State Tax Commissioner appealed to the Supreme Court of Appeals of West Virginia (R. 168-169). In the meantime, the special commissioners appointed by the decree of May 18, 1939 (R. 128, 165) to make sale of the property of the coal company, executed the decree by selling the property of the company on June 1, 1939. At this sale the comissioners offered the property of the company in parcels and as a whole. No bid was made for the property when offered for sale in parcels, and the only bid made therefor as a whole was that made by petitioner. Before the petitioner bid for the property, it delivered to the special commissioners a written memorandum addressed to them and which stated that, "All bids made by or on behalf of Piney Coking Coal Land Company for the property of Leccony Smokeless Coal Company, or any part thereof, under the decree entered in the chancery cause of Harry E. Moran against Leccony Smokeless Coal Company and others on the 18th day of May, 1939, are made subject to the terms and provisions of said decree, and to the priority of liens as fixed and adjudicated by such decree and not otherwise". This memorandum was signed by petitioner by its president and vice-president. No objection was made to the condition on which petitioner proposed to and did bid for and purchase the property. The commissioners accepted the bid of $37,500.00 made by petitioner for the property on the condition stated in the memorandum (R. 173-174). The report of sale made by the commissioners to the court, among

other things, recited the provisions of the decree of May 18, 1939, with respect to the purchase of the property by a lien creditor, and the right of the creditor to have credited against the purchase price any lien held by the purchaser against the property of the company; that Piney Coking Coal Land Company claimed the benefit of such provisions of the decree; that the company had paid to the commissioners the sum of $7,500.00 and had expressed its willingness to pay any additional sum, if any, in cash that might be required to pay the costs of the suit and the sale, and of maintaining the property during receivership, and to pay off and discharge the lien held by the State of West Virginia against the personal property of the company for unpaid specific personal property taxes for the years 1937 and 1938 amounting to the sum of $1,346.72, and also the personal property tax of the company for the year 1939, not then ascertained, and the sum of $256.45 remaining unpaid on account of the purchase price of ten Sanford Day drop bottom cars purchased by the company under conditional sale contract. The commissioners further reported that petitioner had assigned and transferred the benefit of its purchase of the property of the coal company to Leccony Smokeless Fuel Company, and that petitioner requested the Commissioner to report such sale as having been made to the Fuel Company which they reported accordingly. The Fuel Company thereupon took the benefit of the purchase of the property by petitioner and paid to the Commissioners the sum of $37,500.00 (R. 176-178). Another decree pronounced in the cause August 23, 1939, filed the Commissioner's report of sale to which there were no exceptions, and the court perceiving no just ground of exception thereto the said report, together with the sale therein reported, was in all respects ratified and confirmed, the purchase price paid for the property received and directed deposited and special commissioners appointed to

make, execute and deliver to the Fuel Company an apt and sufficient deed of sale or assignment, as the circumstances might require, transferring and assigning it the properties and leasehold estates theretofore owned and held by Leccony Smokeless Coal Company "subject, nevertheless, to the terms and provisions of decrees heretofore entered in this cause". This decree discharged the special receivers and directed them to deliver possession of the properties to the Fuel Company (R. 170-171). The State Tax Commissioner did not object to the terms of sale, or to the conditions on which it was made, or to commissioner's report of sale, or to the decree pronounced August 23, confirming the report of sale and finally adjudicating the priority of the lien of petitioner for unpaid rents and royalties over the lien of the State for its excise taxes, nor did he appeal from that decree.

On the appeal of the Tax Commissioner from the decree of August 23, ratifying and confirming the decree of May 18, the Supreme Court of Appeals held that (a) the lien of the State, under chapters 106 and 108, Acts of Legislature, 1937, for gross sales and consumer's sales taxes, penalties and interest which accrued during the years 1937-38 (R. 1-6), was superior in priority to all rights of petitioner under its lease and sublease, including the right of re-entry, for default made by the Coal Company prior to December 15, 1938, in the payment of rents, royalties and taxes, and (b) was also superior and prior to the lien held by petitioner for unpaid rents, royalties and taxes under the terms of its purchase of the property of the lessee at the sale thereof made June 1, 1939, under the decree of May 18, 1939, and the confirmation of that sale and purchase by the court without objection by the Tax Commissioner by a final decree pronounced in this cause August 23, 1939 (R. 5-30), which decree also finally adjudicated the lien of petitioner for unpaid rents and royalties to be prior to the lien of the

State for its excise taxes, *notwithstanding the Tax Commissioner did not appeal from that final decree* (R. 1-2).

V.

The questions sought to be reviewed are:

First. May the State deprive petitioner of its right to receive accrued rents and royalties owing to it by its lessee for coal mined from the demised premises, and of its vested right under the terms of its lease and supplemental lease to Leccony Smokeless Coal Company, and the provisions of Section 15, Article 4, Chapter 36, Code of West Virginia (3) (Apx., p. 24) to re-enter the demised premises for defaults made by the lessee in the payment of such rents and royalties prior to and during receivership by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal Constitutional questions involved and raised on the record of this cause by petitioner in that court?

Second. Does Section 12 of Article 13, Chapter 106, Acts Legislature West Virginia, 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease to Leccony Smokeless Coal Company within the meaning of Article I, Section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts?

Third. Does Section 17 of Article 15, Chapter 108, Acts Legislature West Virginia, 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease to Leccony Smokeless Coal Company within the meaning of Article 1, Section 10, of the Federal Constitution, providing that no State shall pass any law impairing the obligation of contracts?

Fourth. Does the taking by the State under the tax statutes of West Virginia, referred to in above questions "Second" and "Third", of so much of the proceeds derived from the sale of the property of the coal company as is necessary to discharge rents and royalties which accrued to petitioner during the period January 1, 1938, to December 15, 1938, and thereafter during the receivership, and the application thereof to the payment of excise taxes owing by the Coal Company to the State, impair the obligation of the lease and supplemental lease from petitioner to the Coal Company within the meaning of Article I, Section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts?

Fifth. Petitioner having been enjoined by the decree of December 15, 1938, by authority of Sections 81 and 82 of Article 1, Chapter 31, Code of West Virginia (4) (Apx., pp. 24-25), from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, does the taking by the State, of so much of the proceeds derived from the sale of the property of the Coal Company as is necessary to pay rents and royalties which accrued to petitioner during the period January 1, 1938, to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership under authority of the decree of December 15, 1938, deprive petitioner of its property in such part of the proceeds of such sale without due process within the meaning of Amendment XIV, Section 1 of the Federal Constitution?

Sixth. Does the taking by the State of the property right which petitioner acquired in the proceeds derived from the sale of the property of the Coal Company under the decree of May 18, 1939, and the confirmation of sale by the final decree of August 23, 1939, not appealed from by the State Tax Commissioner, and the appropriation of that property

right to the payment of excise taxes owing by the Coal Company to the State, deprive petitioner of such property right without due process within the meaning of Amendment XIV, Section 1 of the Federal Constitution?

Seventh. Does the State by the decision of the Supreme Court of Appeals in this cause deny to petitioner the equal protection of the laws of the State within the meaning of the due process clause of Amendment XIV, Section 1 of the Federal Constitution?

How Constitutional Questions Raised.

The decree of August 23, 1939, from which the Tax Commissioner appealed, was in favor of petitioner and the constitutional questions involved were raised in the Supreme Court of Appeals of West Virginia by brief filed on behalf of petitioner, pages 24-25, 33-34 (Ten copies of the brief filed on behalf of the Piney Coking Coal Land Company in the Supreme Court of Appeals of West Virginia have been lodged with the Clerk of this Court as exhibits to this petition), and petition for rehearing, pages 9-10, 13-14 (R. 211).

VI.

Reasons Suggesting Necessity for Issuance of Writ.

The following reasons indicate that the points involved in this cause are sufficiently important to justify the issuance of the writ of certiorari:

Petitioner was enjoined by the decree of December 15, 1938, from exercising the vested right it had under the express terms of its lease and sublease to the Coal Company, and under Section 15 of Article 4, Chapter 36, Code of West Virginia, to re-enter and repossess the demised premises as of its former estate therein, for defaults made by its lessee in the payment of rents and royalties prior to receivership. During receivership, and while such in-

junction was in force, tonnage royalties accrued and unpaid on coal mined from the properties of petitioner by authority of the decree of December 15, 1938, amount to $4,998.31, plus interest (R. 103). That decree expressly provided that mining operations should be carried on subject to all the rights, liens and remedies of petitioner under its lease and sublease to the Coal Company (R. 73-75). By re-entry petitioner would have acquired absolute ownership of the leaseholds and leasehold estates and of all improvements on the demised premises. It is, therefore, a matter of grave public concern that the proceeds derived from the sale of the leasehold and leasehold estates, and from the improvements located on the demised premises, belonging to petitioner have been taken by the State of West Virginia without compensation and appropriated by it to the payment of excise taxes owing to it by Leecony Smokeless Coal Company.

First. The State may not deprive petitioner of its vested right under the express terms of its lease and supplemental lease to the coal company (R. 26-28), and the provisions of section 15, article 4, chapter 36 Code of West Virginia (3) (Appx. p. 24), to re-enter the demised premises for defaults made by the lessee in the payment of rents and royalties prior to the institution of this suit, by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal constitutional questions involved and raised on the record by petitioner.

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505, 74 L. Ed. 999;

Truax v. *Corrigan,* 257 U. S. 312 (1921), 66 L. Ed. 254;

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673 (1929), 74 L. Ed. 1107;

Northern Pacific Railway Co. v. *North Dakota,* 236 U. S. 585 (1914), 59 L. Ed. 735;

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389 (1924), 69 L. Ed. 342;

Norris v. *State of Alabama*, 294 U. S. 587 (1934), 79 L. Ed. 1074;

Pierre v. *State of Louisiana*, 306 U. S. 354 (1938), 83 L. Ed. 757;

Great Northern Railway Co. v. *The State of Washington*, 300 U. S. 154 (1936), 81 L. Ed. 573.

Second-Third. (1) The chief value of the assets of the company consisted of the lease and supplemental lease and the 114 dwellings and other improvements made by the lessee on the demised premises. By re-entry petitioner would have acquired the absolute ownership of these leaseholds and improvements. Therefore, the right to re-enter was the right to this property, and both sections 12 and 17 of chapters 106 and 108 Acts 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease from petitioner to the coal company within the meaning of Article 1, section 10 of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts, in that the lien of the State under those two sections for excise taxes owing to it by the mining company is held to be prior and superior to the vested right of petitioner, under the express terms of the lease and supplemental lease and the provisions of section 15, article 4, chapter 36, Code of West Virginia, to re-enter the demised premises for defaults made by the lessee in the payment of rents and royalties prior to the institution of this suit.

Helvering v. *Bruun*, 309 U. S. 461, 84 L. Ed. 593, 105 F. (2d) 442;

Parr v. *Blue Ridge Coal Company*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;

Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;
United States v. *City of Quincy*, 71 U. S. 535 (1866), 18 L. Ed. 403;
Green v. *Biddle*, 21 U. S. 1 (1823), 5 L. Ed. 547;
LeSage v. *Switzer*, 116 W. Va. 657, 182 S. E. 797.

(2) Petitioner having been enjoined by the decree of December 15, 1938, by authority of sections 81 and 82 of article 1, chapter 31, Code of West Virginia, from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, the taking by the State of so much of the proceeds derived from the sale of the property of the coal company as is necessary to pay rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership under authority of such decree, and the application thereof to the payment of excise taxes owing by the coal company to the State, denied to petitioner the equal protection of the laws of the State of West Virginia and contravened Amendment XIV, section 1 of the Federal Constitution.

Parr v. *Blue Ridge Coal Company*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;
Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;
Dobbins v. *Los Angeles*, 195 U. S. 223 (1904), 49 L. Ed. 169;
Yick Wo v. *Hopkins*, 118 U. S. 356 (1886), 30 L. Ed. 220;
Jew Ho v. *Williamson*, 103 Fed. 10;
Park Hill Dev. Co. v. *City of Evansville* (*Ind.*), 130 N. E. 645.

Fourth. The taking by the State under sections 12 and 17, chapters 106 and 108, Acts 1937, of so much of the pro-

ceeds derived from the sale of the property of the coal company as is necessary to discharge rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, and thereafter during receivership, and the application thereof to the payment of excise taxes owing by the coal company to the State, impairs the obligation of the lease and supplemental lease from petitioner to the coal company within the meaning of Article 1, section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts, in that the Supreme Court of Appeals of West Virginia has consistently held that a landlord may not be deprived of the right to re-enter the demised premises under the provisions of section 15, article 4, chapter 36, Code of West Virginia, for default made by the tenant in the payment of rents and royalties, except upon condition that unpaid rents and royalties be discharged out of proceeds derived from the sale of property belonging to the tenant.

Parr v. *Blue Ridge Coal Co.*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;

Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;

United States v. *City of Quincy*, 71 U. S. 535 (1866), 18 L. Ed. 403;

Green v. *Biddle*, 21 U. S. 1 (1823), 5 L. Ed. 547;

LeSage v. *Switzer*, 116 W. Va. 657, 182 S. E. 797.

Fifth. Petitioner having been enjoined by the decree of December 15, 1938, by authority of sections 81 and 82 of article 1, chapter 31, Code of West Virginia, from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, the taking by the State of so much of the proceeds derived from sale of the property of the coal company as is neces-

sary to pay rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership, under authority of the decree of December 15, 1938, deprived petitioner of its property in such part of the proceeds of such sale without due process within the meaning of Amendment XIV of section 1 of the Federal Constitution.

Chicago, Burlington and Quincy R. Co. v. *Chicago,* 166 U. S. 226 (1896), 41 L. Ed. 979;

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505 (1929), 74 L. Ed. 999;

State v. *Walruff,* 26 Fed. 178 (1886).

Sixth. The taking by the State of the vested property right which petitioner acquired in so much of the proceeds derived from the sale of the property of the coal company as was required to discharge rents and royalties owing petitioner by the decree of confirmation of sale pronounced August 23, 1939, *not appealed from by the State Tax Commissioner,* and the appropriation thereof to the payment of excise taxes owing by the coal company to the State, deprived petitioner of such proceeds without due process within the meaning of Amendment XIV, section 1, of the Federal Constitution.

Eakin v. *Eakin,* 83 W. Va. 512, syl. pt. 8, and pp. 520-21, 98 S. E. 608;

Cale v. *Shaw,* 33 W. Va. 299, 10 S. E. 637;

Hardman v. *Brown,* 77 W. Va. 478, syl. pt. 2, 88 S. E. 1016;

Blankenship v. *Mongini,* 105 W. Va. 530, 143 S. E. 301;

Chicago, Burlington and Quincy R. Co. v. *Chicago,* 166 U. S. 226 (1896), 41 L. Ed. 979;

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505 (1929), 74 L. Ed. 999;

State v. *Walruff,* 26 Fed. 178 (1886).

Seventh. The decree of August 23, 1939, confirming the Commissioner's sale and adjudicating the right of petitioner to receive unpaid rents and royalties, out of the proceeds derived from sale of the property of the coal company, to be prior to the lien of the State under Sections 12 and 17, Chapters 106 and 108, Acts 1937, for excise taxes owing to it by the Coal Company, was a final decree from which the Tax Commissioner had the right to appeal to the Supreme Court of Appeals of West Virginia under Section 1, Article 5, Chapter 58, Code of West Virginia, (6) (Apx., p. 26) at any time within eight months from the time of the rendition of the decree under the provisions of Section 4, Article 5, Chapter 58, Code of West Virginia, (7) (Apx., p. 26), and, not having appealed from such decree, it is conclusive of the prior right of petitioner, and the taking by the State of so much of the proceeds of sale as is necessary to discharge accrued rents and royalties owing to petitioner by the coal company and the receivers, denies to petitioner the equal protection of the laws of the State of West Virginia and contravenes Amendment XIV, Section 1 of the Federal Constitution.

National Citizens Bank v. *Bank of Charles Town,* 114 W. Va. 839, 174 S. E. 420;

Barbour et al. v. *Tomkins,* 58 W. Va. 572, 52 S. E. 707;

Dobbins v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169;

Yick Wo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220;

Jew Ho v. *Williamson,* 103 Fed. 10;

Park Hill Dev. Co. v. *City of Evansville* (*Ind.*), 130 N. E. 645.

Wherefore, your petitioner respectfully prays that a writ of certiorari do issue out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia commanding that court to certify and send to this Court for its review and determination, on a

day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Supreme Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

PINEY COKING COAL LAND COMPANY,
By WILLIAM H. SAWYERS,
ASHTON FILE,
Attorneys for Petitioner.

FILE, SCHERER & FILE,
Of Counsel.

November, 1940.

(1) (Chap. 33, Art. 13, Section 12, Acts First Ex. Sess. 1933—Gross Sales Tax.)

Sec. 12. A tax due and unpaid under this article shall be a debt due the state and shall be a lien upon the property used in the business or occupation upon which it is imposed. The lien shall have the same priority as the lien of the general property tax. A penalty of five per cent of the tax shall be added for any default for thirty days or less and for each succeeding thirty days elapsing before payment there shall be added an additional penalty of one per cent. The additional one per cent penalty shall not apply until a ten day notice of delinquency shall have been sent to the taxpayer.

(2) (Chap. 106, Section 12, Acts 1937—Gross Sales Tax.)

Sec. 12. Lien of Tax Due and Unpaid. A tax due and unpaid under this article shall be a debt due the state. It shall be a personal obligation of the taxpayer and shall be a lien upon all property used in the business or occupation upon which such tax is imposed and said lien shall have priority over all other liens and obligations except those due the United States. A penalty of five per cent of the tax shall be added for any default for thirty days or less, and for each succeeding thirty days elapsing before payment there shall be an additional penalty of one per cent.

(2) (Chap. 108, Art. 15, Section 17, Acts 1937—Consumers Sales Tax.)

Sec. 17. Lien of Tax; Penalties. A tax due and unpaid under this article shall be a debt due the state. It shall be a personal obligation of the taxpayer and shall be a lien upon all of the property of the taxpayer. The lien shall have priority over all other liens and obligations except those due the United States.

A taxpayer who fails to file his return and remit the tax at the time required by this article shall, in addition to all other penalties, pay a penalty of six per cent of the amount of the tax collected during the period reported. For each succeeding thirty days elapsing before payment there shall

be added an additional penalty of one per cent. If the taxpayer is an association, or corporation, the officers thereof whose duty it is to make the return and pay the tax shall be personally liable, jointly and severally, for any default on the part of the corporation.

(Section 15, Article 4, Chapter 36, Code West Virginia.)

(3) § 15. Covenant for Reentry for Default of Lessee.—If in a lease it be provided that "the lessor may reenter for default in the payment of rent or for the breach of covenants," or if the lease contains words of like import, such words shall have the effect of an agreement that if the rent reserved, or any part thereof, be unpaid on or after the day specified in the deed for the payment thereof, or if any of the other covenants on the part of the lessee, his personal representatives or assigns, be broken, then, in either of such cases, the lessor, or those entitled in his place, at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may reenter and the same again have, repossess and enjoy, as of his or their former estate.

(Sections 81-82, Article 1, Chapter 31, Code West Virginia.)

(4) § 81. Dissolution by Suit in Equity. If not less than one-fifth in interest of the stockholders of a corporation desire to wind up its affairs, they may apply by bill in chancery to the circuit court of the county in which the principal office or place of business of such corporation is situated, or, if there be no such office or place of business in this State, to the circuit court of the county in which the other stockholders or members, or any one or more of them, reside or are found, or in which the property of such corporation, or any part of it may be, setting forth in the bill the grounds of their application, and the court may thereupon proceed according to the principles and usages of equity to hear the matter, and, if sufficient cause therefor be shown, to decree a dissolution of the corporation and make such orders and decrees, and award such injunctions in the cause as justice and equity may require. * * *

(4) § 82. Receivers for Corporations. When a corporation expires or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, any such court as is mentioned in the preceding section may, on application of a creditor, stockholder or member, appoint a receiver to take charge of and administer its assets; and, whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the cause as justice and equity may require. This section shall apply to corporations heretofore or hereafter chartered by another state which may have done business or acquired property or contracted debts in this State, and any of whose creditors or stockholders or their personal representatives, or debtors, reside in this State; and the circuit court of any county wherein such creditor, stockholder, or their personal representatives, or person indebted to the corporation, may reside, or wherein such assets or property or any part thereof may be, shall afford such relief as is appropriate under this and the preceding section.

(5) (Sections 12-13 of Article 6, Chapter 37, Code West Virginia.)

(12) Distress for Rent; Time and Place; Warrant. Rent may be distrained for within one year after the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by any sheriff or constable of the county wherein the premises yielding the rent or some part thereof may be or the goods liable to distress may be found, under a warrant from a justice founded upon the affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed.

(13) Property Subject to Distress. The distress may be levied on any goods of the lessee, or his assignee or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee or under tenant, when carried on

the premises, are subject to a lien which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, they shall be liable to distress, but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No goods shall be liable to distress other than such as are declared to be so liable in this section.

(Section 1, Article 5, Chapter 58, Code of West Virginia.)

(6) (1) When Appeal or Writ of Error Lies. A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order; * * *

(g) In any case in chancery wherein there is a decree or order dissolving or refusing to dissolve an injunction, or requiring money to be paid, or real estate to be sold, or the possession or title of property to be changed, or adjudicating the principles of the cause; * * *

(Section 4, Article 5, Chapter 58, Code of West Virginia.)

(7) (4) Time for Appeal or Writ of Error. No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented.

No. 9023

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

FILED

APR 5 1940

CLERK OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

HARRY E. MORAN,

Plaintiff Below,

vs:

LECCONY SMOKELESS COAL COMPANY, ET ALS.,

Defendants Below,

ERNEST K. JAMES, State Tax Commissioner,

Appellant,

PINEY COKING COAL LAND COMPANY, BECKLEY NATIONAL EXCHANGE BANK, TRUSTEE, AND LECCONY SMOKELESS COAL COMPANY,

Appellees.

Brief Of Counsel For Piney Coking Coal Land Company, Beckley National Exchange Bank, Trustee, and Leccony Smokeless Coal Company, Appellees.

WILLIAM H. SAWYERS,
FILE, SCHERER & FILE,
Counsel for Piney Coking Coal Land Company,
ASHWORTH & SANDERS,
Counsel for Beckley National Exchange Bank, Trustee, and Leccony Smokeless Coal Co.

WOODWARD PRINTERS, CHARLESTON, W. VA.

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Brief Of Counsel For Piney Coking Coal Land Company, Beckley National Exchange Bank, Trustee, and Leccony Smokeless Coal Company, Appellees.

MEMORANDUM

It is submitted that the brief filed on behalf of the appellant does not fully and accurately state the kind of suit, issues and how raised, or how the issues were decided and what the decree of the court was, as required by rule of this

court. It is further submitted that the brief does not state all of the facts necessary to an understanding and fair determination of the sundry questions involved in this cause. To attempt at this point to particularize such omissions would seem to be illogical and because of prolixity would in a large measure fail of its purpose. Rather, we beg to submit a concise statement of so much of the record as will fully present the merits of the cause as we understand it.

STATEMENT OF THE CAUSE — (x) (xx)

This is a suit in equity brought in the Circuit Court of Raleigh County on the 13th day of December, 1938, by Harry E. Moran, a stockholder of Leccony Smokeless Coal Company holding and owning more than one-fifth of its total outstanding capital stock, against Leccony Smokeless Coal Company, Claude Jarrett and Richard R. Conant, (Jarrett and Conant owning the remaining shares of the capital stock of the company), Beckley National Exchange Bank, successor Trustee, The Raleigh County Bank, Beckley National Exchange Bank, Piney Coking Coal Land Company, Sewell Smokeless Coal Company, Lake & Export Coal Corporation, Appalachian Electric Power Company and E. C. Minter, for the dissolution of Leccony Smokeless Coal Company, and the appointment of receivers to take charge of and administer its assets, pursuant to the provisions of Code 31-1-81. No one challenged either the purposes or sufficiency of the bill so that a detailed statement of its allegations would seem to be unnecessary. Suffice it to say that the company was hopelessly insolvent, and on that account

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(x) Numerals in brackets ( ) refer to pages of the record.

(xx) Numerals in brackets (B) refer to pages of brief for appellant.

was unable to further carry on its business of mining and shipping coal. It was beset and harassed, by its legion of creditors, to the extent that the haven of receivership became its only refuge from the storm that threatened to destroy the value of its assets to its creditors. It is important, however, to state that the bill charged that the assets of the company were of greater value to its creditors if held together, than if dissipated by execution sales at the suit of individual creditors, and prayed that an injunction issue restraining all creditors of the company from prosecuting suits against it, and also from interferring with its property and assets in the custody of the receivers (9-21).

On December 13, 1938, the plaintiff presented its bill duly verified, with accompanying exhibits, to the Circuit Court of Raleigh County, and the defendant Coal Company at the same time presented its answer to the bill admitting the truth of its allegations and joined in the prayer of the bill for relief (69-70). Whereupon, a decree was entered appointing the defendant Claude Jarrett special receiver for the Coal Company (5-7). That decree was set aside by a decree entered on the 15th day of December, 1938; (71-72) and on that day another decree was entered appointing Claude Jarrett and John P. Bonner, joint special receivers of the property and assets of the defendant Coal Company, on motion of the plaintiff Moran. That decree recited that the court was of the opinion that sufficient cause had been shown for the court to take charge of and administer the property and assets of the Company by the appointment of special receivers; that it was necessary for the protection of the rights, interests and equity of the plaintiffs, and as well also those of the other stockholders and creditors of the company, that its property and assets be conserved, protected, marshalled and administered, the business and affairs of the

company wound up by a court of equity, and that it further appeared to the court that the Coal Company owned only personal property, but did not own any real estate; "It is, therefore, adjudged, ordered and decreed as follows: subject and subordinate to the terms and provisions of this decree with respect to the property, rights, interests and lien or liens of the said Piney Coking Coal Land Company." (72-73).

Notwithstanding the alleged and admitted insolvency of the Coal Company the decree authorized, empowered and directed the special receivers to continue the business of the Coal Company of mining and shipping coal until the further order of the court, and for that purpose were authorized, empowered and directed to raise or borrow money by the issuance and sale, or upon Receiver's Certificates, not to exceed the sum of $50,000.00, to be used in meeting the payrolls and other expenses of receivership, and to continue the business of the Coal Company, including the maintenance of stocks of merchandise in the store or stores operated by the company sufficient to continue such business under receivership, but in so operating the business the special receivers were prohibited from creating or incurring any indebtedness over and above, or in excess of the amount of $50,000.00, authorized by the decree without the further order of the court. The sum so authorized was required to be repaid, at the end of ninety days from the date of issue, out of the surplus of the money coming into the hands of the said special receivers, after the payment of all rents and royalties accruing to Piney Coking Coal Land Company during the receivership from the sale of coal mined and shipped at the mining plants of the Coal Company. The decree further authorized the special receivers to employ such laboring men, clerks, attorneys and other employees as might be necessary

to continue such business and to preserve, manage, dispose of and administer the property and assets of the company,

> "but subject and subordinate in all respects to all liens heretofore accrued and to hereafter accrue to the said Piney Coking Coal Land Company, and to all rights and remedies of the said Piney Coking Coal Land Company, as Lessor of the said Leccony Smokeless Coal Company, for rents and royalties heretofore accrued or hereafter accruing under any and all of the leases, supplemental leases and agreements held by the said Leccony Smokeless Coal Company, as Lessee of the said Piney Coking Coal Land Company, Lessor, on lands and interest in lands situated in Raleigh County, West Virginia, and described in such leases, supplemental leases and agreements." (75)

The compensation of Claude Jarrett as special co-receiver was fixed by the decree at the sum of $600.00 per month, but made no provision for compensating John P. Bonner, special co-receiver, who served without pay (75).

The decree enjoined all persons, firms and corporations from instituting or further prosecuting actions at law, or suits in equity, against the company, or from in any manner interferring with the possession of its property and assets by the special receivers (74-76).

At February Rules, 1939, Piney Coking Coal Land Company filed its answer to the plaintiff's bill denying the right of the court to authorize the special receivers to continue mining operations to the prejudice of its rights and set up its claim against the Coal Company for unpaid rents and royalties and asserted its liens for the payment thereof. Other contents of the answer will be hereafter more fully stated (78-91). Appalachian Electric Power Company also filed its answer at February Rules and the defendants, Lake &

Export Coal Corporation and Richard R. Conant, filed their joint and separate answer in open court on March 7, 1939 (77, 97).

On the 7th day of March, 1939, the cause was referred to Millard F. French, one of the Commissioners in Chancery, who was directed to ascertain (1) the personal property owned by the company, the liens against such personal property, by whom held and their respective amounts and priorities; (2) the real estate owned by the company, the liens against the real estate and by whom held and their respective amounts and priorities, and (3) all properties and assets of the company and report to court (94-95).

On May 18, 1939, the Commissioner filed his report in open court from which it appears that the plant and equipment of Leccony Smokeless Coal Company consisted of the property set forth in the inventory shown in record pages 129 to 132; an inventory of the repair shop equipment pages 132 to 134, and the improvements shown on page 134. The Commissioner also found that the Coal Company was the owner of the surface of a parcel of land containing 87/100 of an acre on which there was a ten room house; that it also owned a power line about one mile in length, running from the town of Besoco to the village of Walkertown, and had sufficient transformers, wires and meters to service about seventy-five houses; that the company held a lease from Piney Coking Coal Land Company, dated June 8, 1925, covering a total of 2064.85 acres, and a supplemental lease dated July 1, 1930, covering 428.31 acres of land. Total acreage leased being 2493.16 acres (99-107).

STATEMENT OF SEVERAL CLAIMS OF APPELLEES

The several claims of the appellees arose at different times under different instruments and will, therefore, be separately stated under appropriate headings.

CASE OF PINEY COKING COAL LAND COMPANY

By Indenture of Lease dated June 16, 1925, and duly recorded in Raleigh County Court Clerk's office June 18, 1925, Piney Coking Coal Land Company let and leased unto Leccony Smokeless Coal Company certain lands in Raleigh County for coal mining purposes for the term and period of twenty years. Descriptions of these lands were omitted from the record by stipulation of counsel (182-186).

By Article Sixth of this Lease the lessor excepted and reserved unto itself the entire ownership and control of the property for all purposes except those conferred by the lease on the lessee (23-24).

Sections Third and Fourth of Article VII provided for the payment of tonnage royalties and an irreducible minimum annual rental (24-26). Section Thirteenth of Article VII required the lessee to pay all local, state and federal taxes and assessments, including betterments of every kind and nature, that might be levied or assessed against the leased premises, and from coal mined or coke manufactured during the continuance of the lease and for any royalties or rent payable by the lessee under the terms thereof, and further provided that if such taxes and assessments were paid by the lessor the lessee should re-pay to the lessor the amount thereof, such amount to be recovered, on default of prompt payment, in the manner provided in Section Fifteenth of that Article.

Section Fifteenth of Article VII is as follows:

> "All rents and royalties and other payments herein agreed to be paid shall be deemed and treated as rents reserved upon contract by the Lessor, which reserves to itself all rights and remedies of landlords, under all present and future laws of the State of West Virginia for the collection of the same, including the right of reentry; and if any of the rents, and royalties or other payments shall remain unpaid for fifteen days after the same became due and payable, as before provided, the Lessor shall have the right to enforce payment of the same by the remedies given by law to landlords against delinquent tenants for non-payment of rent; and it is further agreed that not only the personal property shall be subject to distress as contemplated and directed by law, but also the Lessor may enter upon the leasehold and sell the same or any part thereof, together with the improvements thereon, for the default in the payment of the rents and royalties as set aforesaid.
>
> "The Lessor shall have a first and prior abiding lien upon the leasehold estate hereby created, and upon all personal property now or hereafter upon the premises herein described, and upon all permanent and temporary improvements now or hereafter placed thereon, to secure the prompt payment of all rents, royalties, and taxes which may from time to time become due to the Lessor from the Lessee under the provisions of this lease, over a period not to exceed two years, regardless of whether or not the sums secured by this lien amount to more than a year's rent. * * *" (26-28).

Section Sixteenth contained a covenant against assignment and encumbrance, without the consent in writing of the lessor, and further provided that in the event the lessor consented to the giving of a mortgage or deed of trust by the lessee on its interest in the leased premises, any sale made

under such mortgage or deed of trust should not in any wise impair or affect any of the rights and privileges of the lessor against the lessee, but should always be subject and inferior to such rights and privileges (28-29).

Section Eighteenth of this Article, among other things, provided:

> "In case of forfeiture for any cause under this lease, all mines, tunnels, drifts, slopes, shafts, airways, drains, entries, passages, gangways, rooms, headings, pillars, supports, ventilating machinery and appliances, fans, doors, brattices, pumps, houses, buildings, structures, ovens, engines, including all rails, tracks, etc., in fact everything which has heretofore been used in the mining operations, and which may be necessary or convenient for the continued workings and mining of the coal or of pillars, supports, etc., shall be left in good order and condition, so that the mining may be continued by the Lessor, its assigns or tenants, or succeeding Lessees, without delay or interruption, and shall revert to and become the property of the Lessor." (30)

Section Twenty-first of the lease, among other things, provided that if the lessee should be adjudged bankrupt or insolvent, or make an assignment for the benefit of its creditors, or if its property or any part thereof, should be placed by order of court in the hands of a receiver or other court officers, then and in such event, at the election of the lessor, the term and leasehold interest thereby created, and all rights of the lessee under said lease should forthwith cease and determine and the lessor should be entitled to reenter the leased premises and to exclude the lessee therefrom and to hold the leased premises as of its former estate, anything in said lease to the contrary notwithstanding, but a re-entry by the lessor should not be necessary for the purpose

of enforcing a forfeiture under this provision of the lease. It further provided that this remedy should be merely cumulative and should not deprive the lessor of any of its other legal or equitable remedies (30-31).

By Supplemental Lease dated July 1, 1930, and recorded in Raleigh County Court Clerk's office February 14, 1931, Piney Coking Coal Land Company let and leased unto Leccony Smokeless Coal Company certain additional lands in Raleigh County for coal mining purposes, descriptions of which were likewise omitted from the record by stipulation, under and subject to the payment of the same rents, royalties and taxes and to all the terms and provisions of the above mentioned lease of June 16, 1925, erroneously referred to as being dated June 8, 1925 (57-60).

The answer of Piney Coking Coal Land Company, among other things, charged that at the time of the appointment of the special receivers on December 15, 1938, Leccony Smokeless Coal Company was owing and indebted to it for rents and royalties which accrued during the months of January to December 15th, 1938, in the sum of $27,846.11, and $3,044.22 taxes on the leased premises for the last half of the year 1937, and the first half of the year 1938, which taxes were a part of the rent, making the total of royalties and taxes $30,890.33, which amount was subject to be credited with payments made in the months of September, October and November, 1938, aggregating $9,240.08, leaving the net balance due for royalties and taxes $21,649.53, plus interest thereon (80-82).

The answer also in substance alleged the above quoted and other mentioned provisions of the lease of June 16, 1925, and the Supplemental Lease of July 1, 1930, with respect to the rents and royalties to be paid, and the terms and pro-

visions of the lease and supplemental lease with respect to the liens and the rights and remedies of Piney Coking Coal Land Company for the collection of the same, together with the right of re-entry (83-86).

The answer further denied the right of the Circuit Court to authorize or direct the special receivers to continue the business of Leccony Smokeless Coal Company of mining and shipping coal from the lands of the lessor until the property could be sold, or for any length of time, to the prejudice of the rights or the remedies of the lessor, or to prevent the lessor from exercising its rights for the collection of rents, royalties and taxes due or to become due to it from the Coal Company under the lease and supplemental lease, respectively, and charged that if such business was carried on it must be done subject and subordinate to all of the rights and liens of the Land Company under its lease and supplemental lease. It also denied the right of the plaintiff, or anyone else, to assign or transfer the lease or supplemental lease without the license and consent in writing of the lessor and charged that if the same were assigned and transferred without its license and consent in writing it would exercise its rights under the terms of the lease and supplemental lease to forfeit the same (87-88).

The answer prayed that the cause be referred to a Commissioner to take and report the liens and their priorities on the real estate of the Coal Company; that the court decree that Leccony Smokeless Coal Company was owing and indebted to it for the rents and royalties set up in the answer as owing to it and that the court decree that the Land Company had the first lien against all of the personal property owned by the Coal Company located on the leased premises, or not removed therefrom more than thirty days, and that

the Land Company also had the first lien on all improvements located on the leasehold and supplemental leasehold, respectively, and the several leaseholds and leasehold estates thereby created for the payment of all such rents, royalties and taxes and for general relief. This answer was duly verified (78-90).

The amounts of the rents, royalties and taxes claimed by the Land Company against the Coal Company, as set up in its answer, were not controverted.

The Commissioner found that Leccony Smokeless Coal Company was owing and indebted to Piney Coking Land Company for rents and royalties under the lease and supplemental lease referred to, which accrued during the period of January 1, 1938, to December 15, 1938, $20,116.35; that it owed Piney Coking Coal taxes, as part of the rent, for the year 1938 $3,088.08; that the Coal Company also owed the Land Company for rents and royalties which accrued since December, 1938, $4,998.31, the total amount of such rents, royalties and taxes aggregating the sum of $28,202.74 (110).

1. Code 37-6-18 gave to Piney Coking Coal Land Company as lessor under the Indenture of Lease to Leccony Smokeless Coal Company, dated June 16, 1925, recorded June 18, 1925, and under the Supplemental Lease dated July 1, 1930, recorded February 14, 1931, liens for one year's stipulated rents or royalties, whether accrued or not, upon the tenants' chattels carried on the leased premises, over all other liens created after the commencement of the tenants' several terms, though no distress warrant had been issued therefor.

Anderson v. *Henry*, 45 W. Va. 319, syl. pt. 1;
Huffard v. *Akers*, 52 W. Va. 21;
In re: *Wynne*, 30 Fed. Cas. (No. 18117 D. Va), 752.

2. The liens given to the landlord by sec. 18, art. 6, chap. 37, Code, attached *at the commencement of each tenancy* or at the moment chattels were brought on the respective leased premises, and such liens existed by virtue of the statute independently of any method or proceeding for enforcing them.

Anderson v. *Henry*, 45 W. Va. 319;
Pepsi-Cola Bottling Co. v. *Indian Rock Bottling Co.*, 98 W. Va. 269;
Dingess Rum Coal Co. v. *Draper Eagle Coal Co.*, 108 W. Va. 37;
In Re: *Cardwell*, 52 Fed. (2d) 158;
Ginsburg v. *Lindel*, (8th Cir.) 107 Fed. (2d) 721, pts. 4 and 11;
JONES ON LIENS, (3d ed.) sec. 553;
36 C. J., sec. 1461.

3. The provisions of Section 15 of the lease from Piney Coking Coal Land Company to Leccony Smokeless Coal Company (27) that "The Lessor shall have a first and prior abiding lien upon the leasehold estate hereby created, and upon all personal property now or hereafter upon the premises herein described, and upon all permanent and temporary improvements now or hereafter placed thereon, to secure the prompt payment of all rents, royalties, and taxes which may from time to time become due to the Lessor from the Lessee under the provisions of this lease, over a period not to exceed two years, regardless of whether or not the sums secured by this lien amount to more than a year's rent" * * * gave to Piney Coking Coal Land Company a specific valid lien on all of the personal property of the Coal Company on the leased premises, and upon all permanent and temporary improvements thereon, to secure the prompt payment of all rents, royalties and taxes which accrued to the

lessor and remained unpaid for a period not to exceed two years.

Lewin v. *Telluride Iron Works*, (8th Cir.) 272 Fed. 590, points 1, 4 and pp. 592-94, 596-97;
Neilson v. *Peterson*, (Idaho) 215 Pac. 836;
3 POM. EQ. JUR., (4th ed.) sec. 1235;
Eagle Coal Co. v. *Gravlee*, (Ala.) 72 Sou. 30;
Walker v. *Brown*, (U. S.) 41 Law Ed. 865, at page 871.

4. The lease and supplemental lease to the Coal Company required it to pay all taxes and assessments levied or assessed against the lands leased, and upon the coal mined therefrom, during the continuance of the lease and supplemental lease, and also provided that "all rents and royalties and *other payments* herein agreed to be paid shall be deemed and treated as rents reserved upon contract by the Lessor, which reserved to itself all rights and remedies of landlords under all present and future laws of the State of West Virginia for the collection of the same, including the right of re-entry" (26-27). Under the terms of these several leases the taxes on the leased premises, assumed to be paid by the company, were a part of the rent.

Woolsey v. *Abett*, (N. J.) 48 Atl. 949;
McCann v. *Evans*, (Pa.) 185 Fed. 93;
In re: *Copping's Estate*, (Tex.) 29 Fed. (2d) 998;
Guild v. *Sampson*, (Mass.) 122 N. E. 712, pts. 4, 5;
Britton v. *Western Iowa Co.*, 9 Fed. (2d) 488, pts. 3, 10;
Perrin & Smith Printing Co. v. *Cook Hotel & Excursion Co.*, (Mo.) 93 S. W. 337;
W. S. Quenby Co. v. *Sheffield*, (Conn.) 79 Atl. 179.

5. The rights reserved to the landlord in each of these leases to re-enter for default in the payment of rent or royalty was a vested property right, and gave to it, in case of such default, the right to re-enter "into and upon the demised premises, or any part thereof, in the name of the whole * * * and the same again have, repossess and enjoy, as of his or their former estate."

Code 36-4-15.

6. The Special Receivers elected to hold the several leases from the Land Company in order that its property and mining plant might be preserved intact for offering for sale as a going mining operation. The landlord was enjoined from distraining for rents and royalties and from interferring with the property of the company, including these leases, brought into the custody of the court by the special receivership. Therefore, the landlord could not be deprived of its right of re-entry except upon condition that the rents and royalties then in arrears were required to be paid.

Parr v. *Blue Ridge Coal Co.*, 72 W. Va. 174, syl. pt. 3;

Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247;

Wood's Appeal, 30 Pa. St. 274;

Escher v. *Harrison Securities Co.*, 79 Fed. (2d) 777;

Bantleon v. *Smith*, 2 Binney 145;

Fleming v. *Fleming Hotel Co.*, (N. J.), 61 Atl. 157;

O'Dell v. *H. B. Altman Co.*, 223 Fed. 292;

Clark Receivers, 601, sec. 526.

7. The statutory remedy for enforcing a landlord's lien by distress is not exclusive, and the liens held by the landlord were enforceable at its instance in this suit, because these leaseholds were brought into the custody of the court burdened with these several liens, and in the distribution of the

property on the leased premises the court was bound to recognize and enforce such liens.

Kahle v. *Oil Co.*, 51 W. Va. 313;
Laidley v. *Kline*, 23 W. Va. 565, syl. pt. 2;
12 ENCY. PL. & PR. 934, sec. 7;
18 AM. & ENG. ENCY. LAW (2 ed.) 351, par. (h);
Berry v. *Berry*, (Kan.) 55 Pac. 348, syl. pt. 2;
Bisbee v. *Mt. Battie Mfg. Co.*, (Me.) 77 Atl. 778, pts. 2, 3;
36 C. J., 528, sec. 1555.

8. The state having only a general lien against the property of the company for the payment of these taxes, in marshalling the assets of the company, the proceeds derived from the sale of its property, against which there were no specific liens, must first be applied to the payment of these taxes, and only in case of a deficiency may money, otherwise applicable to the discharge of one or more specific liens held against specific property, be applied to the payment of such taxes.

Ball v. *Setzer*, 33 W. Va. 444;
Kanawha Valley Bank v. *Wilson*, 25 W. Va. 242, syl. pt. 8;
Wiley v. *Mahood*, 10 W. Va. 206, syl. pt. 8;
Oliver v. *Stovall*, 93 W. Va. 88, syl. pt. 4.

CASE OF BECKLEY NATIONAL EXCHANGE BANK, SUCCESSOR, TRUSTEE, AND OF BONDHOLDERS.

Leccony Smokeless Coal Company executed a mortgage to National Exchange Bank of Beckley, Trustee, dated June 15, 1930, on all of the property which it owned, including its leasehold estates, to secure a bond issue of $200,000.00. Piney Coking Coal Land Company gave its consent in writing to the execution of this mortgage, but specifically reserved to itself, and its successors and assigns, all its liens,

encumbrances, rights and remedies under any and all its leases mentioned and described in and mortgaged by said indenture for any and all purposes (56). This mortgage was duly admitted to record in Raleigh County Court Clerk's office on June 17, 1930 (34-56). The entire issue of bonds was sold and of this issue there remained unredeemed and outstanding, when the cause was heard, bonds to the face amount of $101,000.00, which were owned outright, or held as collateral security by Beckley National Exchange Bank, Bluefield Produce & Provision Company, Bluefield Supply Company, E. H. Crouch Lumber Company, Raleigh Hardware Company, Beckley Dry Cleaner and The Raleigh County Bank (110-111).

CASE OF THE BOARD OF EDUCATION OF RALEIGH COUNTY.

By deed of trust dated December 11, 1935, and regularly recorded in Raleigh County Court Clerk's office December 23, 1935, Leccony Smokeless Coal Company conveyed the 87/100 of an acre of surface, and improvements thereon, to Clarence W. Meadows, Trustee, to secure the payment to The Board of Education of Raleigh County of two negotiable promissory notes for the sum of $500.00 and $1,000.00, respectively, made payable in three and six months after date, respectively (91-94).

The Commissioner found that the note for the sum of $1,000.00 with interest thereon was due and unpaid to The Board of Education, and that the Board held a first lien under the deed of trust against this lot and improvements for the payment thereof (108).

LIENS AND THEIR PRIORITIES.

The decree entered by the court May 18, 1939, on the report of the Commissioner fixed the liens and priorities against the personal property of the company as follows:

1. The first lien was for personal property taxes due the State of West Virginia for the years 1937 and 1938 in the amounts of $694.12 and $652.60, respectively. Also personal property taxes to accrue for the year 1939 not then ascertained.

2. The second lien, except as to certain articles held under conditional sale contracts, was the lien of Piney Coking Coal Land Company for rents, royalties and taxes, with interest thereon, which accrued to it under the lease and supplemental lease held under Piney Coking Coal Land Company.

3. The third lien was the lien of the holders of the first mortgage bonds under the mortgage of June 15, 1930.

The decree then established certain prior rights of judgment lien creditors, and vendors (139) of personal property under conditional sale contracts, but as to the equity in such properties, and the personal properties of the company, the *fourth* lien against such properties was the lien of the United States for taxes (143) and the *fifth* lien was the lien of the State of West Virginia for gross sales taxes and consumers sales taxes (144).

With respect to the 87/100 acres of land owned by the Company, subject to the property tax due the State of West Virginia for the year 1939 not ascertained, the Board of Education of Raleigh County was decreed to have the *first* lien for the payment of the note for $1,000.00 with interest thereon secured by deed of trust (140-141). With respect

to the 87/100 acres of land and the chattels real the *second* lien against the 87/100 acres of land and the *first* lien against the chattels real, was the lien of the bondholders under the mortgage (141).

The decree then proceeded to fix the priority of certain judgments and laborers' liens which were adjudicated to be prior to the lien of the United States for its taxes and the lien of the State of West Virginia for gross sales taxes and consumers sales taxes (143-144).

Taxes due the State of West Virginia for gross sales taxes for the last quarter for the year 1937, $1,028.55, penalties $488.54; gross sales taxes accrued during the year 1938, $6,322.72, penalties $645.66; consumers sales taxes accrued during the year 1937, $199.74, and consumers sales taxes accrued during the year 1938, $236.93, plus penalties of $23.57, $20.18, $15.71 and $14.64.

The Commissioner found that Leccony Smokeless Coal Company owed the state gross sales tax accrued during the year 1938 on sales made at the mine of Sewell Smokeless Coal Company, which had nothing to do with its operations on the lands of the Piney Coking Coal Land Company, in the principal sum of $952.87, and a penalty of $92.12.

It will be noted that the Commissioner did not make any distinction between the lien of the state for the taxes and penalties, respectively (109-112).

Other liens were reported by the Commissioner but they are not important to the questions involved here.

ERRORS ASSIGNED AND PROPOSITIONS TO MEET THEM

First.—Counsel for the Tax Commissioner state in substance in their brief that the state has the same right and lien against property of the tax debtor for the collection of gross sales and consumers sales taxes that it has for the collection of taxes levied or assessed against specific property, and that no distinction is to be made between the rights of "general lien" creditors and the rights of "specific lien" creditors. (B. 15-16).

1. The lien of the state for taxes, levied or assessed against *specific* property, is prior to any and all other liens against such property, whereas the state has only a general lien against the general property of the tax debtor for its indirect taxes.

State v. *County of Kanawha,* 26 W. Va. 159;
Acts 1937, chap. 106, sec. 12.

2. A lien is either "specific" or "general". A "specific lien" attaches to *specific property* as security for some demand which the creditor has with respect to that property, and specific liens have always been favored by the courts.

A "general lien" is one which the holder thereof is entitled to enforce as security for the performance of *all the obligations,* or *all of a particular class of obligations,* which exist in his favor against the owner of property. General liens are said to be regarded by the courts with jealousy, and are not therefore favored by them.

JONES ON LIENS, (3d ed.) secs. 14, 16-17;
17 R. C. L. 599, sec. 6;
Rohrbach v. *Germaina Fire Ins. Co.,* 62 N. Y. 47, at page 56;
Flanders v. *Aumack,* 67 Am. St. Rep. 504, at pp. 509-510;

Dikeman v. *Jewel Gold Mining Co.*, 13 Fed. (2d) 118;
Steinman v. *Wilkins*, 7 Watts & S 466;
7 WORDS & PHRASES, (1st ser.) 6604.

GROSS SALES TAXES AND PENALTIES AND CONSUMERS SALES TAXES OWING TO THE STATE OF WEST VIRGINIA.

Since the Gross Sales Tax, and penalties, and the Consumers Sales Tax claimed by the state accrued under different statutes, we will discuss the question of the priority of the right of the state to receive the different taxes and penalties.

First as to the Gross Sales Tax.

A gross sales tax was first imposed by Chapter 110, Acts Legislature 1921, and parts thereof have been amended, or the Act repealed and re-enacted as follows: Chap. 1, Ex. Sess. 1925; Chap. 33, Acts First Ex. Sess. 1933; Chap. 86, Acts 1935; Chap. 106, Acts 1937, and Chap. 120, Acts 1939.

The legislature, for the first time, provided by sec. 12, chap. 106 Acts 1937, Code 11-13-12, that gross sales taxes "shall be a lien upon all property used in the business or occupation upon which such tax is imposed and said lien shall have priority over all other liens and obligations except those due the United States."

So also, the legislature for the first time provided by sec. 17, chap. 33, Acts Ex. Sess. 1933, Code 11-13-17, for priority of the right of the state to receive its taxes due and unpaid under art. 13, chap. 11 Code, providing for payment of a gross sales tax, in the distribution, voluntary or com-

pulsory, in receivership, bankruptcy, or otherwise, of the estate of corporations.

The tax statute in force at the time the different instruments were executed under which the several rights of the appellees arose, gave the state a lien for these indirect taxes "upon all the property of the tax payer", which lien could not, in any way, affect or impair liens and other property rights created or attached prior to the time the state's taxes accrued.

Acts 1925, First Ex. Sess., chap. 1, sec. 11.

> "I. A legislature, in creating a lien for privilege taxes, may make the lien superior to all other liens existing before * * * the enactment of the statute. (B. 5).
>
> * * *

Neither the case of *Trust Company* v. *Hall*, nor *Marshall* v. *New York*, 254 U. S. 380, supports the proposition stated.

In the *Hall* case this court quoted with approval the statement of an eminent author, "It is not only competent for the legislature to provide that taxes shall have a paramount lien upon the lands assessed, but it is within its constitutional power to enact that such liens shall have the precedence over all mortgages or other encumbrances made or given before the enactment of the law creating the tax lien, and existing at the date of its passage". (pp. 689-690). Clearly, the tax referred to is a property tax levied against specific property, whereas, the taxes involved in the case at bar were not levied or assessed against any property nor are they "property" taxes. COOLEY TAXATION, (4th ed.) Sec. 269. Nowhere is it stated that it is competent for the legislature to provide that the lien of the state for gross sales tax shall

have precedence over all mortgages or other encumbrances made or given before the enactment of the law creating the tax lien, and existing at the date of its passage. The only question involved in *Marshall* v. *New York*, 254 U. S. 380, was whether the right of the state to collect its taxes was prior to the rights of common creditors against the tax debtor. The court in its opinion said: "Nor does any question arise as to priority of the state over encumbrances". (p. 382) * * * "Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York". (p. 386).

> "(b) Such an act does not impair the obligation of contract in violation of Section 10, Article I, Constitution of the United States, nor Article III, Section 4, of the Constitution of West Virginia." (B. 5-6).
>
> * * *

Not one of the decisions of the United States Supreme Court cited in appellant's brief under the foregoing subheading "(b)" supports the proposition therein stated.

> "II. * * *
>
> "(a) It is a general rule that property used in a business may be subjected to a lien for an excise or occupation tax on the business carried on, although it is not owned by the person carrying on the business." (B. 6).

Manifestly, therefore, under the foregoing proposition, the state claims the right to subject any property used in the business of mining and shipping coal to the payment of these indirect taxes, including lands leased to the company for coal mining purposes by virtue of such use in its business, although the Coal Company had but a leasehold estate

therein and that estate subject, under the express terms of the lease, to be forfeited for the non-payment of rents and royalties.

The tax involved in the case of *Hodge* v. *Muscatine County*, 196 U. S. 276, was a property tax levied and assessed against the property of the taxpayer, and, therefore, has no application to the foregoing proposition.

A glance at many of the cases cited in brief for appellant will at once disclose the statute involved and construed to be radically different from Section 12 as amended in 1937. *State* v. *Wynne*, 133 S. W. (2d) (B 6) will illustrate this statement. Therefore, such cases are inapplicable as authority for the propositions which they are cited to support.

APPELLANT'S PROPOSITIONS — "I" (B. 5) "(b)" (B. 5-6); "II" "(a)" (B. 6) GROUPED AND RESTATED BY REFERENCE THERETO.

Second.—To make the lien of the State of West Virginia for these indirect taxes prior to the rights of re-entry of the Land Company under its several leases and its several liens for unpaid rents and royalties, and to the mortgage lien of the bondholders under the mortgage, and of the Board of Education under the deed of trust, all of which were vested property rights prior to the effective dates of the 1937 and 1939 amendments of Section 12, would:

(a) Violate the obligation of the several contracts under which these several property rights were created or acquired, and thereby contravene the provisions of Section 10, Article I of the Federal Constitution, and of Section 4, Article III of the Constitution of West Virginia, which prohibit the state from passing any law violating or impairing the obligation of a contract;

(b) Violate the provisions of Section I of Article XIV of the Amendments to the Federal Constitution in that it would take their property to pay the personal obligations of another to the state and thereby deprive them of their several property rights without due process, and also

(c) Violate Article X of the Constitution of West Virginia in that the state would indirectly lay on or against the property of the several appellees taxes in excess of the taxes authorized by that Article to be laid on or against such property, and take the property to pay such taxes.

> COOLEY CONST. LIM., (8th Ed.) pp. 738-40, 554, and note 6;
>
> *LeSage* v. *Switzer*, 116 W. Va. 657, 659-61.

> "III. The West Virginia Legislature has created a lien in favor of the State for gross sales and consumers' sales taxes, and has in express terms, provided that it take priority over all other liens, whether created prior to or subsequent to the enactment of the statutes." (B 7).
>
> * * *
>
> "IV. It was the intention of the legislature that the statutes creating liens in favor of the State of West Virginia for gross sales and consumers' sales taxes (Code, 11-13-12, Chapter 106, Acts, 1937, and Code, 11-15-17, Chapter 108, Acts 1937), should operate retrospectively, and hence those liens rank ahead of and are paramount to the claims against specific property represented by conditional sales agreements, vendor's liens, liens of lessors for rents and royalties, and the laborer's lien involved in the case at bar." (B 7).

Third.—Section 12, art. 12, chap. 33, Acts First Ex. Sess. 1933, as amended by art. 13, chap. 106, Acts 1937, to provide that the lien conferred on the state for business and

occupation taxes "shall have priority over all other liens and obligations, except those due the United States" is not retroactive in its operation to interfere with vested rights, but is to be applied only to future cases arising after the effective date of the amendment. And the same is true of the further amendment of this section by chap. 120, Acts 1939, giving the state a lien for tax penalties.

1. A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance so as not to disturb vested interests, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which *would be inoperative* otherwise than retrospectively. In all cases of doubt, every presumption is against the retroactive operation of a statute.

Central Trust Co. v. *Hall*, 106 W. Va. 687;
Stewart v. *Vandervort*, 34 W. Va. 524, syl. pt. 3;
State v. *Mines*, 38 W. Va. 125, syl. pt. 5;
Rogers v. *Lynch*, 44 W. Va. 94, syl. pt. 3;
Jenkins v. *Heaberlin*, 107 W. Va. 287, at page 290;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 213;
Shwab v. *Doyle*, (U. S.) 66 L. Ed. 747, pts. 1 and 3;
Jones v. *Fidelity & Columbia Forest Co.*, (6th Cir.) 73 Fed. (2d) 446;
Campbell & Co. v. *Nonpareil F. B. & K. Co.*, 75 Va. 291, 298;
Price's Ex'or v. *Harrison's Ex'or*, 31 Gratt. 114, 119-122;
City of Montpelier v. *Senter*, (Vt.) 47 Atl. 392, at p. 393;
COOLEY'S CONST. LIM., (8th ed.) Vol. 2, pp. 772-773;
COOLEY TAXATION, (4th ed.) Vol. 2, sec. 514;

LEWIS SUTH. STAT. CONST., (2nd ed.) Vol. 2, sec. 643.

2. Statutes imposing taxes upon subjects and citizens are to be construed strictly in favor of the taxpayer and against the taxing power, and are not to be extended by implication beyond the clear import of the language used.

Vinson v. *County Court*, 94 W. Va. 591, syl. pt. 3;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 213;
COOLEY TAXATION, (4th ed.) Vol. 2, sec. 514;
Commonwealth v. *Hutzler*, (Va.) 97 S. E. 775;
LEWIS' SUTH. STAT. CONST., (2nd ed.) Vol. 2, sec. 537; 59 C. J., sec. 670.

3. Courts applying the rule of strict construction to revenue laws have uniformly held that although the words of a statute are broad enough, if literally construed, to comprehend existing cases, they must be interpreted as applying to cases that may thereafter arise unless a contrary intention is unequivocally expressed therein.

Rogers v. *Lynch*, 44 W. Va. 94, 97, syl. pt. 3;
Campbell & Co. v. *Nonpareil F. B. & K. Co.*, 75 Va. 291, pt. 3;
Gould v. *Gould*, (U. S.) 62 L. Ed. 211, 214;
Crigler's Committee v. *Alexander's Ex'or*, 33 Gratt. 674, 677.

4. Chapter 106, Acts 1937, amending sec. 12, art. 12, chap. 33, Acts First Ex. Sess. 1933, was passed March 13, 1937, and made effective from passage; and chap. 120, Acts 1939, amending sec. 12, art. 13, chap. 106, Acts 1937 was passed March 2, 1939, and made effective ninety days from passage. The legislature by fixing the day on which these two amendments should become effective thereby stamped the prospective character thereof upon the face of each Act

and excluded any intention of the legislature of making either one of the amendments retroactive in its operation.

CONSTITUTION OF W. VA., Art. 6, sec. 30;
State v. *Pinson*, 76 W. Va. 572;
Dewart v. *Purdy*, 29 Pa. St. 113;
LEWIS' SUTHERLAND STAT. CONST., (2d ed.) Vol. 1, sec. 175;
26 AM. & ENG. ENCY. LAW, (2d ed.) 695;
State v. Roney, (O.) 92 N. E. 486, pt. 1;
Thompson v. *Board of Commrs.*, (Kan.) 275 Pac. 205, pt. 1;
59 C. J., sec. 673.

5. The pertinent part of the enacting clause of Chapter 106, Acts 1937, amending and re-enacting sec. 12, art. 13, chap. 11, Code 1931, is:

> "That sections three, twelve * * * article 13, chapter 11, Code West Virginia 1931, as amended * * * be amended and re-enacted to read as follows: The amendment follows.

In the case of *State* v. *Mines*, 38 W. Va. 125, syl. pt. 7, it is held:

> "When a statute is amended and re-enacted with the words, 'so as to read as follows,' or words of like effect, those parts of the re-enactment embraced in the former law are not considered as repealed and re-enacted, but as law all along continuously from their original enactment; *but the new parts are considered as law for the first time from the commencement of the amended act.*" (Italics ours).

6. The rule that laws are not to be construed as applying to cases which arose before their passage is applicable when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money or property in other ways.

Lwellyn v. *Frick*, (U. S.) 69 L. Ed. 934, at page 937, and cases there cited;
People v. *Longhman*, (N. Y.) 164 N. E. 253, pt. 7 and page 257;
Massa v. *Nash*, (Conn.) 3 Atl. (2d) 839, 841;
59 C. J., 1172-3, sec. 697.

7. "No statute, *however positive*, is to be construed as designed to interfere with *existing contracts*, rights of action, or suits, and *especially vested rights*, unless the intention that it shall so operate is expressly declared; and the courts will apply new statutes only to future cases, unless there is something in the very nature of the case or in the language of the new revision which shows that they were intended to have a retroactive operation." (Italics ours).

Central Trust Co. v. *Hall*, 106 W. Va. 687.

8. There is nothing in the language used either in sec. 12, as amended in 1937, or as amended in 1939, to indicate legislative intent to make the provisions of either of those amendments retroactive. To the contrary, the case of *Central Trust Company* v. *Hall*, *supra*, holding that the lien of the State for gross sales taxes, under the gross sales Act of 1921, did not take priority over a lien created prior to the time that act took effect, was decided by this court February 19, 1929, and the fact that the legislature did not use appropriate language in amending section 12 in 1937 to indicate an intent to make it retroactive in its operation, creates the presumption that the legislature was familiar with the construction thus given by the court to the old act and had that in mind when section 12 was amended and re-enacted by the act of 1937.

Parsons v. *County Court*, 92 W. Va. 490, syl. pt. 4;
Pennington v. *Gillaspie*, 63 W. Va. 541, syl. pt. 1.

ARGUMENT

The major question involved here is by no means a new problem. The appearance of man on the dim horizon of the past is marked by his protest against the oppression of the tax gatherer, and the rise and fall of the varied civilizations through which he has since passed, is told in the history of his relative successes and failures to stay the power of the state to destroy, by unwise and unjust taxation.

On what principle of justice and fair dealing does the state base its contention that this tax statute should be construed to be retroactive in its operation, and in effect confiscate and appropriate to the use of the state vested private property vouchsafed to its citizens by its laws in force when such rights were acquired, and under which they were held for many years prior to the adoption of this amendment by which the state now seeks to expropriate these property rights? The only answer to this important question, found in the brief of the Attorney General, is that the property rights of citizens of the state are swallowed up in the sovereign power of the state to tax, and that merely begs the proposition involved.

We venture the statement that if the members of the 1937 Legislature, that passed this amendment, had known that the state would claim that such amendment should be construed to be retroactive in its operation to destroy vested property rights, it would not have gotten beyond the committee; or if reported out by the committee, to use the vernacular of the street, it would have been "beaten to a frazzle".

There is nothing in this amendment of section 12 to indicate a legislative intent to make it retroactive, and in the absence of such provision the law is plain and well settled

that it is not to be construed to be retroactive to interfere with vested property rights, but must be held to apply only to future cases arising subsequent to the time the amendment was passed.

The Supreme Court of the United States, in the case of *Lewellyn* v. *Frick*, 69 L. Ed. 934, at page 937, discussing this question, in its opinion said:

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

In the case of *Massa* v. *Nastri*, 3 Atl. (2d) 839, the Supreme Court of Connecticut, held, syl. pt. 7:

> "A statute will not be given a retroactive construction by which it will impose liabilities not existing prior to its passage."

And in its opinion on page 841, the court said:

> "A statute will not be given a retroactive construction by which it will impose liabilities not existing prior to its passage. 'Laws which create new obligations * * * because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect, unless the contrary clearly appears.' Pignaz v. Burnett, 119 Cal. 157, 160, 51 P. 48, 49; In re Estate of Parker, 200 Cal. 132, 142, 251 P. 907, 49 A. L. R. 1025; 59 C. J. 1172. The rule that laws are not to be construed as applying to cases which arise before their passage is applicable when to disregard it would impose an un-

expected liability that if known might have caused those concerned to avoid it."

The Supreme Court of New York, in the case of *People* v. *Loughman*, 164 N. E. 253, held, syl. pt. 7:

"General principle that laws are not to be construed as applying to cases which arose before their passage is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways."

The court in its opinion, at pages 256-257, said:

"If we construe the statute as intended to apply to corporations which had already obtained a conditional sanction to do business in the state, then this relator is subjected to inequality by reason of an unexpected change in conditions under which such sanction was offered and accepted. The measure of the obligation is changed after the obligation has been assumed. The circumstances that liability to pay an increased tax is based upon a transaction already completed might, indeed, raise doubt as to the power of the state to impose such liability. The statute should be construed in such manner as to free it from such doubt. *The state should not be subjected to a justified charge of unfairness.* The general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." (Italics ours).

CONSTITUTIONAL QUESTIONS INVOLVED

The Tax Commissioner not only contends that the 1937 and 1939 amendments of section 12 are retroactive in their operation, but that the retroactive operation thereof is constitutional upon the ground that they apply to all persons alike who come within their provisions, but this again merely begs the question. The property of one person cannot be taken to pay the personal obligation of another to the state, even though the obligation be in the form of general indirect taxes.

Under the law in force when the property rights in question were acquired, or established, the several liens held by the parties were prior to the lien of the state for such taxes. The parties contracted with respect to the law in force at the time. On this question this court in *LeSage* v. *Switzer*, *supra*, page 660, in its opinion said:

> "The law, as it was then, entered into the proposal of plaintiffs to borrow the money as well as into the acceptance thereof by the creditor. The minds of the parties met under that law. It became a component part of the contract. The *creditor is entitled to have the contract enforced according to the law of the contract.* This is a fundamental rule of the common law and is recognized in West Virginia as well as by the federal authorities. *'The law at the time of the contract is part of it.'* " (Italics ours).

In 2 Cooley's Const. Lim., (8th Ed.) pages 738-740, the general principle involved is treated by the author in the following language:

> "On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same

> rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land.
>
> * * *
>
> "While no one has a vested right in any particular rule of the common law, the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process of law is intended to preserve, and a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

This contention of the Tax Commissioner is completely answered and refuted by the case of *LeSage* v. *Switzer, supra*, at pages 659-60, in which this court, in its opinion, said with respect to the retroactive provision of the Act then under consideration:

> "So far as it would be retroactive, it is confronted by the following inhibition of the Constitution of the United States, Article I, section 10: 'No state shall * * * pass any * * * law impairing the obligation of contracts.' The Act is also confronted by a like inhibition in the Constitution of West Virginia, Article III, section 4.
>
> "We have found no clearer conception of the purpose of this inhibition than that expressed by Associate Justice Trimble in Ogden v. Saunders, 12 Wheat. (U. S.) 213, 327, 6 L. Ed. 606, as follows: 'The great principle intended to be established by

> the constitution, was the inviolability of the obligation of contracts, *as the obligation existed and was recognized by the laws in force at the time the contracts were made.* It furnished to the legislatures of the States a simple and obvious rule of justice, which, * * * whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation, or such qualified obligation as, in their opinion, may consist with sound policy, and the good of the people; *it prohibits them from retrospecting upon existing obligations, upon any pretext whatever.*" (Italics ours).

ECONOMIC PLIGHT OF THE COAL INDUSTRY

There are other aspects to the momentous questions arising in connection with the construction to be given to the 1937 amendment of section 12, which many times transcend, in importance to the state, the taxes it now seeks to collect. The coal industry of this state is now, and has been for many years, staggering under the burdens and handicaps of unusually heavy taxation; loss of markets to other fuels; competition within the industry, and the constantly growing demands for increased expenditures to mechanize mines in order to reduce the cost of production, and thereby enable the producers in West Virginia to compete in domestic and foreign markets with the coal producers of other states and foreign countries. The inherent hazards of the industry have made it difficult, under favorable conditions, for coal companies ordinarily well financed, to borrow money for plant expansion or to purchase necessary new machinery and equipment. This lack of credit has been largely overcome by the almost universal practice (a) of purchasing new machinery and equipment under conditional sale contracts, and (b) by indulgences extended by landlords in not exacting payment of rents and royalties, in times of financial

stress, as nominated in the leases. The vendors have relied on their reservations of title, and the landlords on their liens and rights of re-entry conferred by Code 37-6-18, and 36-4-15, as security for payments to them, and have heretofore been regarded by them as good security therefor. Now, therefore, if section 12 of this statute as amended in 1937 is to be given the construction contended for by the Attorney General on this appeal, then these avenues of credit will of necessity be withdrawn, and the coal companies thereby reduced to the status of beggars in the marts of trade, and their employees forced on the relief rolls of the state.

The circumstances of the financial problems of the Coal Company, disclosed by this record, graphically demonstrate the verity of the foregoing statements.

This company was largely in arrears in tonnage royalties and taxes during the year 1938, and if its landlord had required payment thereof as they fell due, it would have been driven out of business and these indirect taxes would not have accrued.

Yea, if the state had attempted to enforce payment of these taxes, and other taxes owing to it by the company at the beginning of the year, 1938, the company would have been forced to the wall. Instead, the state recognized its financial difficulties and permitted these taxes to accumulate rather than force it out of business, and its employees on the relief rolls by attempting to collect such taxes.

Manifestly, the state stands at the cross roads with one of its major industries, and the future of that industry hangs largely in the balance. Comparatively little may be lost to the state by construing the 1937 amendment of section 12 to be prospective only in its operation, and therefore, in-

operative to disturb vested property rights acquired upon the faith of the law in force at the time such property rights were acquired. On the other hand, to construe this statute as being retroactive in its operation, the state, by one fell swoop, would strike down vested property rights and bring about a stampede of secured creditors of coal companies, and vendors of all kinds of machinery and equipment under conditional sale contracts, to collect on all obligations, and re-possess all such properties, in every case of default in payment, with the inevitable result that coal companies would be driven out of business by the wholesale and relief rolls of the state crowded with honest toilers likewise forced out of employment.

True, taxes are important to the state, but gainful employment of labor, and the success or failure of a major industry, are equally important to the state. Nothing is to be gained by strangling "the goose that lays the golden eggs", even though the state, because of depressed economic conditions, may not at times be able to get all of the eggs that may be laid.

Should this amendment be given the construction contended for by the Attorney General on this appeal, then the plight of the coal industry may well be expressed in the language of the immortal Shakespeare:

> "You take my house, when you do take the prop
> That doth sustain my house; you take my life,
> When you do take the means whereby I live."

The scope and length of this brief has not, in any way, been prompted by doubt or misgivings on our part as to how this court will construe this amendment of section 12. The apparent zeal with which the Attorney General is urging upon the court the construction of this statute contended for by him, has led us, in our efforts to be of some assistance to the court, to thus present this cause in all of its phases as we understand it.

Returning now to the question of how this statute should be construed. Any tax statute, however plain, made retroactive in its operation would mark a new and radical departure from the traditional tax policy of this state, because all such statutes are generally regarded as being contrary to the principles of representative government.

A most exhaustive search of the proceedings had in the legislature in regard to this amendment, as disclosed by the journals of both the House and Senate, fail to disclose the slightest evidence that any member of either House understood that the statute was intended to be retroactive in its operation, and there is manifestly nothing in the language of the amendment indicating such legislative intent.

In conclusion, the proposition is self evident that "*montani semper liberi*" means more than freedom of the person. It also means freedom from invasion by the state of vested property rights acquired and held upon the faith of the laws in force when such rights were acquired.

Manifestly, neither the 1937, nor the 1939 amendment of section 12 is retroactive in its operation; therefore, to the end that justice may be done, we respectfully submit that the decrees made and entered in this cause by the Circuit Court of Raleigh County, May 18, and August 23, 1939, in so far as they adjudicate the respective rights and interests of these appellees, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 568

PINEY COKING COAL LAND COMPANY, A CORPORATION, *Petitioner,*

v.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Respondent.*

BRIEF IN BEHALF OF ERNEST K. JAMES, RESPONDENT, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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STATEMENT

It would seem to be the position of counsel, as appears from the petition, that the judgment in this cause of the Supreme Court of Appeals of West Virginia (R. 198-209), is improper and should be vacated and annulled for the reason that no appeal was taken by respondent from a decree of May 18, 1939 (filed May 21, 1939, *nunc pro tunc*) (R. 128-166), pronounced by the Circuit Court of Raleigh County (P. 2, 10, 12-13). It is respectfully urged that an

appeal was taken from the decree of May 18, 1939, as well as the decree of August 23, 1939. It appears from the petition of respondent to the Supreme Court of Appeals of West Virginia for an appeal and supersedeas to the judgment of the Circuit Court of Raleigh County that respondent was "aggrieved by that certain decree of the Circuit Court of Raleigh County, West Virginia, rendered in the above entitled cause on the 23rd day of August, 1939, which decree ratified and confirmed the decree of May 18, 1939, overruling certain exceptions filed by your petitioner to the report of the commissioner in chancery, under date of May 4, 1939; * * * (R. 1-2). Respondent had previously filed exceptions to the report of the commissioner in chancery (R. 122-125), which were overruled by the decree of May 18, 1939, and the report of the commissioner confirmed. The decree of August 23, 1939, confirmed in all respects the decree of May 18, 1939. Hence, since the statutory period of eight months had not expired within which an appeal could have been prosecuted (R. 4, appeal allowed October 2, 1939, four months after the decree of May 18 pronounced), and inasmuch as the decree of August 23, 1939, in all respects confirmed and adjudicated all principles and property rights involved in the decree of May 18, 1939, the legal effect was, of course, to have prosecuted an appeal from the judgment of the Court as to both decrees. Moreover, this point was not raised by petitioners in this cause in the Supreme Court of Appeals of West Virginia, and we submit it cannot properly be raised here, since there has been no adjudication thereof by that Court.

Complaint is made (P. 14-15) that petitioner was enjoined by the decree of December 15, 1938, pronounced by the Circuit Court of Raleigh County, from exercising its right to reenter the demised premises for certain purposes as provided in the lease. Attention in this respect

is called to the fact that no appeal was prosecuted from that decree by petitioner, nor can an appeal now be taken because of lapse of time.

ARGUMENT

No Federal Question Involved

Petitioner alleges that the judgment of the Supreme Court of Appeals of West Virginia (R. 198-209), pronounced in this cause, deciding that the lien of the State of West Virginia for gross sales and consumers' sales taxes, penalties and interest which accrued during the years 1937 and 1938 (R. 1-6), was superior in priority to all rights of petitioner under its coal mining leases (R. 21-63), entered into in 1925 and 1930, and superior and prior to such liens held by petitioner for unpaid rents and royalties, impairs the obligation of contract in violation of Section 10, Article I of the Federal Constitution, and deprives it of property without due process of law, within the meaning of Section 1 of the Fourteenth Amendment to the Federal Constitution (P. 2-3). It must be apparent, we submit, that the allegation of petitioner that the judgment of the Supreme Court of Appeals of West Virginia with respect to the priority of liens accorded the State of West Virginia as being paramount to all other liens violates the contract clause of the Federal Constitution, and does violence to the due process clause of the Fourteenth Amendment to that Constitution, is fictitious and frivolous, and wholly without substance or merit. It presents no substantial Federal question. We understand that it is settled under numerous decisions of this Court that it will decline jurisdiction although the constitutionality of a State law or other Federal question is involved, where it appears such question is not substantial (*Zucht* v. *King*, 260 U. S. 174), or "is of such an unsubstantial nature as to cause it to be devoid of all merit, and

therefore frivolous" (*Deming* v. *Carlisle Packing Co.*, 226 U. S. 102), and that the assertion of a Federal right must not be wholly without foundation, but "must at least have fair color of support (*Parker* v. *McLane*, 237 U. S. 469). Other decisions in which jurisdiction has been denied or appeals dismissed on similar grounds include: *Wabash Railroad Co.* v. *Flannigan*, 192 U. S. 29; *United States Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652.

The State Supreme Court of Appeals, in holding that the lien of the State for its gross sales and consumers' sales taxes was superior to the lien of petitioner under its mining leases, expressly passed upon a Federal question theretofore determined by this Court, and in a manner wholly in accord with the decisions of this Court. In the case of *Barwise* v. *Sheppard*, 299 U. S. 33, this Court considered a statute of the State of Texas imposing a tax on the production of oil and gas. Appellants, lessors of lands from which oil was produced, contended that that part of the act which imposed a tax upon them, since enacted subsequent to the date of the lease, violated the contract clause of the Federal Constitution, and the due process clause of the Fourteenth Amendment. Holding the statute valid, the Court observed:

> "* * * we are of opinion that it is not an arbitrary fiat and does not infringe the due process of law clause of the Fourteenth Amendment." (P. 39)

In disposing of the contention with respect to the contract clause, this Court said:

> "* * * the lease was made in subordination to the power of the State to tax the production of oil and to apportion the tax between the lessors and the lessee. The taxing act does not purport to reach or affect any term of the lease. Plainly no stipulation in the lease can be of any avail as against

> the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. These views are but a reiteration and application of what repeatedly has been held in respect of contracts and their subordination to the taxing power." (P. 40)

The decisions of this Court in accord therewith are numerous: *Kehrer* v. *Stewart,* 197 U. S. 60; *Lake Superior Consolidated Iron Mines* v. *Lord,* 271 U. S. 577; *Clement National Bank* v. *Vermont,* 231 U. S. 120; *Henderson Bridge Co.* v. *Henderson,* 173 U. S. 592; *Moffitt* v. *Kelly,* 218 U. S. 400.

It is respectfully submitted that the decision of the Supreme Court of Appeals of West Virginia, of which complaint is made, is in strict accord with the decisions of this Court upon the same or similar principles, and must, therefore, stand.

CONCLUSION

None of the grounds referred to in Section 5 of Rule 38 of this Court, nor under Judicial Code, subdivision "b" of Section 237, amending U. S. C. A., Title 28, subdivision "b" of Section 344, for awarding a writ of certiorari, are present here. It does not appear from the record presented to this Court that a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided in any way probably not in accord with applicable decisions of this Court, or that any title, right, privilege or immunity of petitioner under the Constitution is involved. The contention that the decision of the Supreme Court of Appeals

of West Virginia giving priority to the lien for consumers' sales and gross sales taxes over the lien of petitioner under its mining leases impairs the obligation of contract in violation of Section 10, Article I of the Federal Constitution, and the due process clause of the Fourteenth Amendment to that Constitution, is utterly unsubstantial and frivolous, as disclosed by the record and the decisions of this Court. The record discloses no Federal question. On the other hand, the record demonstrates, we think, the absolute soundness of the decision of the State Supreme Court of Appeals, of which complaint is made.

Wherefore, it is submitted that the writ of certiorari as prayed for should be promptly denied by this Court.

Respectfully submitted,

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